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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, *et al.*,
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

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## QUESTION PRESENTED

Whether a Court of Appeals errs in refusing a motion to vacate its judgment as moot prior to the termination of the judicial review process despite the fact that the judgment has subsequently become unreviewable due to a postjudgment settlement occurring prior to the end of the period in which a Writ of *Certiorari* could otherwise have been sought from this Court, and despite the procedural requirements emphasized by this Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979).

Counsel notes that this case presents no novel question. However, *United States v. Munsingwear, Inc., supra,* plainly sets forth the duty of an appellate court to grant a request to vacate its judgment, where a case becomes moot before the review process is complete. The failure of the Former Fifth Circuit to comply with applicable precedent of this Court is so clear that counsel respectfully suggests that the grant of *certiorari* and summary reversal is appropriate in order to protect the integrity of the judicial process.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Former Fifth Circuit were:

Florida Power & Light Company[1]
Federal Energy Regulatory Commission
The Fort Pierce Utilities Authority
The Lake Worth Utilities Authority
The New Smyrna Beach Utilities Commission
The Sebring Utilities Commission
City of Gainesville, Florida
City of Homestead, Florida
City of Key West, Florida
City of Kissimmee, Florida
City of St. Cloud, Florida
City of Starke, Florida
City of Tallahassee, Florida

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[1]Florida Power & Light Company has no parent companies or affiliates. Its subsidiaries are:

Fuel Supply Service, Inc.
Land Resources Investment Company
W. Flagler Investment Corporation

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | vii |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting Review | 7 |
| Conclusion | 11 |

**APPENDICES**

APPENDIX A:
Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules, issued December 21, 1979 ..... A-1

APPENDIX B:
Order Denying Rehearing, Accepting for Filing and Suspending Rate Schedules and Denying Motion for Extension of Time, issued February 6, 1980 ..... A-10

APPENDIX C:
Order [granting intervention], issued May 29, 1980 ..... A-14

APPENDIX D:
Order Accepting in Part for Filing and Rejecting in Part Supplements to Service Agreements, issued July 22, 1980 ..... A-15

APPENDIX E:
Order [granting intervention], issued January 9, 1981 ..... A-18

APPENDIX F:
Order [granting Stipulation of Parties to hold proceeding in abeyance], issued February 9, 1981 ..... A-19

APPENDIX G:
Opinion, issued November 6, 1981; 660 F.2d 668 ..... A-22

APPENDIX H:
Orders [denying Petitions for Rehearing], issued January 22, 1982 ..... A-46

APPENDIX I:
Memorandum [issuance as mandate of November 6, 1981 judgment], issued February 3, 1982 ..... A-52

APPENDIX J:
Settlement Agreement [excerpts from settlement concluded between FPL and Florida Cities], March 3, 1982 ..... A-55

APPENDIX K:
Amended Order of Dismissal, issued March 23, 1982 ..... A-62

APPENDIX L:
Memorandum and Order (Concerning Motions to Dismiss, Terminate and Vacate), issued March 24, 1982 ..... A-64

APPENDIX M:
Application for an Extension of Time to File a Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eleventh (Former Fifth) Circuit, April 22, 1982 ..... A-69

APPENDIX N:
Order Extending Time to File Petition for Writ of *Certiorari*, issued April 23, 1982 ..... A-74

APPENDIX O:
Order Accepting and Adopting Revised Offer of Settlement, issued June 17, 1982 ..... A-76

APPENDIX P:
Statement of Respondent Federal Energy Regulatory Commission, June 17, 1982 ..... A-82

APPENDIX Q:
Order [dismissing No. 80-5922 as moot], issued June 28, 1982 ..... A-84

APPENDIX R:
Order [denying Potomac Electric Power Company motion to intervene in No. 80-5259], issued August 16, 1982 ..... A-85

APPENDIX S:
Order [denying Motion to Vacate as Moot in No. 80-5259], issued August 16, 1982 ..... A-87

## TABLE OF AUTHORITIES

PAGE

COURT CASES

*A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961) ..... 7, 8

*Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., Inc.*, 638 F.2d 7 (2nd Cir. 1980) ..... 7

*Amoco Production Company v. FPC*, 465 F.2d 1350 (10th Cir. 1972) ..... 10

*Black v. Amen*, 355 U.S. 600 (1958) ..... 7

*City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied sub nom. Public Service Commission v. FPC*, 390 U.S. 945 (1968) ..... 10

*Cold Metal Process Co. v. Carnegie-Illinois Steel Corp.*, 115 F.2d 33 (3rd Cir. 1940) ..... 9

*Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936) ..... 8

*Florida Power & Light Company v. Federal Energy Regulatory Commission*, No. 80-5259 (5th Cir.)

May 29, 1980 [unreported] ..... 1
November 6, 1981 [660 F.2d 668] ..... 2, 3, 4, 6, 7, 11
January 22, 1982 [unreported] ..... 2, 4
February 3, 1982 [unreported] ..... 11
August 16, 1982 Order [unreported denial of Potomac Electric Power Company Motion to Intervene in No. 80-5259] ..... 6
August 16, 1982 Order [unreported denial of Motion to Vacate as Moot]* ..... 1, 2, 6, 11

*Order under review in this Petition.

*Florida Power & Light Company v. Federal Energy Regulatory Commission*, No. 80-5922 (5th Cir.)

January 9, 1981 [unreported] ..... 4
February 9, 1981 [unreported] ..... 4
June 28, 1982 [unreported] ..... 4

*Fort Pierce Utilities Authority, et al. v. Florida Power & Light Company*, No. A-905 (U.S. April 23, 1982) ..... 4, 6

*Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) ..... i, 7

*Hammond Clock Co. v. Schiff*, 293 U.S. 529 (1934) ..... 7

*J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959) ..... 7

*Lake Worth Utilities, et al. v. Florida Power & Light Company*, No. 79-5101-Civ-JLK (S.D. Fla. March 23, 1982) ..... 5, 9

*Lebus v. Seafarer's International Union*, 398 F.2d 281 (5th Cir. 1968) ..... 9

*Mitchell Energy Corp. v. FPC*, 519 F.2d 36 (5th Cir. 1975) ..... 10

*NOW, Inc. v. Idaho*, 51 U.S.L.W. 3251 (U.S. October 5, 1982) ..... 7

*St. Louis-San Francisco Railway Co. v. Railroad Yardmasters*, 347 F.2d 983 (5th Cir. 1965) ..... 9

*Schwartz v. Olympic, Inc.*, 174 F.2d 830 (3rd Cir. 1949) ..... 9

*Stewart v. Southern Railway Company*, 315 U.S. 283, *vacated as moot* 315 U.S. 784 (1942) ..... 7

*Superior Oil Co. v. Hickel*, 421 F.2d 1089 (D.C. Cir. 1969) ..... 9

*Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373 (D.C. Cir. 1979) ..... 7

*Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345 (5th Cir. 1962), *cert. denied sub nom. Manufacturer's Light & Heat Co. v. Texas Eastern Transmission Corp.*, 375 U.S. 941 (1963) ..... 10

*Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968) ..... 9

*United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) ..... i, 4, 7, 8, 9, 10

*Vermont Yankee Nuclear Power Corporation v. NRDC*, 435 U.S. 519 (1978) ..... 10

*Verret v. Oil Transport Co., Inc.*, 365 U.S. 768 (1961) ..... 7

*Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) ..... 9

AGENCY CASES

*Florida Power & Light Company*, FERC Docket Nos. ER78-19, *et al.*

"Orders Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules," 9 FERC ¶____ (December 21, 1979), *rehearing denied* 10 FERC ¶61,108 (1980) ..... 2, 3

"Order Accepting and Adopting Revised Offer of Settlement," 19 FERC ¶61,269 (1982) ..... 5, 6

*Florida Power & Light Company*, Docket Nos. ER80-411, *et al.*, "Order Accepting in Part for Filing and Rejecting in Part Supplements to Service Agreements," 12 FERC ¶61,055 (1980) ..... 2, 4

*Florida Power & Light Company* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A, Atomic Safety & Licensing Board, "Memorandum and Order (Concerning Motions to Dismiss, Terminate and Vacate)," 15 NRC 639 (1982) .... 5, 8

STATUTES

Federal Power Act

Section 205(c), 16 U.S.C. §824d(c) ..... 3
Section 313(b), 16 U.S.C. §825*l*(b) ..... 3

United States Code, Title 28 - Judiciary and Judicial Procedure

28 U.S.C. §1254(1) ..... 2
28 U.S.C. §2106 ..... 2

REGULATIONS

Federal Energy Regulatory Commission, Regulations Under the Federal Power Act

18 C.F.R. §35.2(b) ..... 3

BRIEFS AND LEGAL MEMORANDA

Application for an Extension of Time to File a Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eleventh (Former Fifth) Circuit, *Fort Pierce Utilities Authority, et al. v. Florida Power & Light Company*, No. A-905 (U.S. April 22, 1982) ..... 6

Statement of Respondent Federal Energy Regulatory Commission, *Florida Power & Light Company v. Federal Energy Regulatory Commission*, Nos. 80-5259 and 80-5922 (5th Cir. June 17, 1982) ..... 6

MISCELLANEOUS

Settlement Agreement [excerpts from settlement concluded between Florida Power & Light Company and Florida Cities], March 3, 1982 ....4, 5

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OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, *et al.*,
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT

Petitioners *Florida Cities*[2] respectfully pray that a Writ of *Certiorari* issue to review the order of the United States Court of Appeals for the Former Fifth Circuit entered in this proceeding on August 16, 1982.

## OPINIONS BELOW

The unreported order of the Court of Appeals denying Petitioners' Motion to Vacate as Moot, review of which is sought, is captioned *Florida Power and Light Company v. Federal Energy Regulatory Commission*, No. 80-5259 (5th Cir. August 16, 1982), and is attached as Appendix S, p. A-87. The order of the Court of Appeals denying applications

[2]Florida Cities include the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission, the Sebring Utilities Commission, and the Cities of Gainesville, Homestead, Key West, Kissimmee, St. Cloud, Starke, and Tallahassee, Florida, all of whom were intervenors before the Court of Appeals, intervening either as of right or pursuant to the Order of the Court of Appeals of May 29, 1980. [App. C, p. A-14]

for rehearing and a Suggestion for Rehearing *En Banc*, filed January 22, 1982, is unreported, and is attached as Appendix H, p. A-46. The opinion of the Court of Appeals filed November 6, 1981 is reported at 660 F.2d 668, and is attached as Appendix G, p. A-22.

The orders of the Federal Energy Regulatory Commission reviewed by the Former Fifth Circuit are captioned *Florida Power & Light Co.*, 9 FERC ¶ _____, Docket No. ER78-19, *et al.* (December 21, 1979; "Orders Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules"), *rehearing denied*, 10 FERC ¶61,108 (February 6, 1980), App. A, p. A-1 and App. B, p. A-10. The order of the Federal Energy Regulatory Commission whose review the Former Fifth Circuit held in abeyance pending the outcome of Former Fifth Circuit Docket No. 80-5259 is *Florida Power & Light Company*, 12 FERC ¶61,055, Docket Nos. ER80-411, *et al.* (July 22, 1980; "Order Accepting in Part For Filing and Rejecting In Part Supplements to Service Agreements"), App. D, p. A-15.

## JURISDICTION

The order of the Court of Appeals denying Petitioners' Motion to Vacate as Moot was filed August 16, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTE INVOLVED

The statute involved is 28 U.S.C. §2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## STATEMENT OF THE CASE

In this case, the Former Fifth Circuit denied a motion to vacate its judgment as moot after the parties in interest had settled and after the Federal Energy Regulatory Commission ("FERC" or "Commission") had issued an order approving settlement and vacating the Commission orders on which the Former Fifth Circuit's judgment had been based. Petitioners seek *certiorari* to correct this plain error of law. The essential facts follow:

In proceedings before the Federal Energy Regulatory Commission, the FERC staff and certain intervening Florida Cities, petitioners here, alleged that the refusal of Florida Power and Light Company ("FPL") to transmit electric power for smaller municipal electric systems violated the Federal Power Act and the antitrust laws. Pursuant to Section 205(c) of the Act, 16 U.S.C. §824d(c), and §35.2(b) of its regulations, 18 C.F.R. §35.2(b) the Commission ordered FPL to file a transmission tariff. "Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules," *Florida Power & Light Company*, Docket Nos. ER78-19, *et al.* (December 21, 1979), *rehearing denied* 10 FERC ¶61,108 (1980) [App. A, p. A-1 and App. B, p. A-10] The Company sought review in the Former Fifth Circuit Court of Appeals pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b), arguing that the Commission had acted beyond its authority under the Federal Power Act. With certain exceptions, the Court of Appeals accepted FPL's position. *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668 (5th Cir. 1981).

Rehearing applications by the Commission and Florida Cities and a Suggestion for Rehearing *En Banc* by Florida

Cities were denied on January 22, 1982. [App. H., p. A-46][3] On April 23, 1982, an Order Extending Time to File Petition for Writ of *Certiorari* was granted, extending the period to June 21, 1982 [App. N, p. A-74].

In March, 1982, FPL and Florida Cities entered into comprehensive antitrust settlements, covering the *Florida Power & Light Co. v. FERC* transmission case, *supra*, 660 F.2d 668, which is the subject of this appeal, as well as cases before other fora. In their settlement, relying on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the parties agreed to seek dismissal of pending cases as moot. Specifically, the settlement states at p. 16 [App. J at p. A-60]:

> Florida Cities and FPL shall cooperate in attempting to secure the consent of the FERC and any other party in order to vacate the judgment in *Florida Power & Light Company v. FERC*, 660 F.2d 668 (5th Cir. 1981), and the FERC order that was the subject of that judgment on the grounds that the controversy among the parties to those proceedings with respect to the filing of a transmission tariff has been mooted.

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[3]In a companion case, *Florida Power & Light Company v. FERC*, No. 80-5922, FPL appealed from the Commission's "Order Accepting in Part for Filing and Rejecting In Part Supplements To Service Agreement," *Florida Power & Light Company*, 12 FERC ¶61,055 Docket Nos. ER80-411, *et al.* (July 22, 1980) [App. D., p. A-15]. The intervention of Florida Cities was sought and granted in the same manner as in No. 80-5259 [App. E, p. A-18]. This case was held in abeyance pending the outcome of Docket No. 80-5259. *Florida Power & Light Company v. Federal Energy Regulatory Commission*, No. 80-5922 (5th Cir. February 9, 1981)[App. F, p.A-19]. On June 28, 1982, the Eleventh Circuit granted FPL's motion to dismiss No. 80-5922 in light of the Commission's action vacating the Commission orders, which were the basis of appeal in No. 80-5259. [App. Q, p. A-84]

Excerpts from the settlement are Appendix J, p. A-55.[4]

On June 10, 1982, FPL filed a separate settlement with the FERC. Under that settlement, the FERC staff agreed to withdraw its request that FPL file a transmission tariff and to withdraw allegations of anticompetitive activity against the Company, and FPL agreed to support vacation of the judgment of the Fifth Circuit. *Florida Power & Light Company,* 19 FERC ¶ 61,269 (June 17, 1982) [App. O,

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[4]In addition to the litigation that was at issue before the FERC and led to the appeal in this case, FPL and various Florida Cities were also in litigation before the Nuclear Regulatory Commission and the United States District Court for the Southern District of Florida. As to those cases, the settlement states at pp. 15-16 [App. J at pp. A-59-A-60]:

> ...FPL and those Cities which are parties to *Lake Worth Utilities Authority, et al. v. FPL,* S.D. Fla. No. 79-5101-Civ-JLK, shall enter into a stipulation, in the form attached hereto as Exhibit A, dismissing such litigation with prejudice and requesting that the Court vacate as moot its "Order Denying Motions for Summary Judgement on Plaintiff's Gas Claim and Granting Defendant's Summary Judgment Motion on Plaintiff's Nuclear Access Claim," dated October 9, 1981...
>
> . . . (5) a motion shall be filed, in the form attached hereto as Exhibit E, in which ... (ii) Florida Cities and FPL request that those proceedings be terminated without further litigation or other action and that the "Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits," issued by the Atomic Safety and Licensing Board in NRC Docket No. 50-389A on December 11, 1981, be vacated as moot.

As we set forth at p. 8, n. 8, *infra,* both the District Court and Nuclear Regulatory Commission ("NRC") granted motions to vacate their respective orders.

p. A-76]. These settlements resolved the underlying controversy among the parties to the appellate proceedings below. Florida Cities supported this second settlement.[5]

On June 17, 1982, the Federal Energy Regulatory Commission approved the settlement, thus binding the Commission. *Id.*[6] On the same day, FPL and the Florida Cities moved to have the Former Fifth Circuit vacate as moot its decision in *Florida Power & Light Co. v. FERC, supra,* 660 F.2d 668. The Commission filed a statement with the Former Fifth Circuit confirming that the underlying controversy in that case was moot. [App. P, p. A-82][7]

On August 16, 1982, the Former Fifth Circuit denied the Motion to Vacate as Moot, without opinion or explanation. [App. S, p. A-87]

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[5]A separate settlement before FERC was necessary to terminate antitrust issues before the Commission because the FERC orders which were the subject of the appeal in *Florida Power & Light v. FERC, supra,* had been interlocutory and because the staff was a separate party to the Commission proceedings.

[6]As we state above, on April 22, 1982, Florida Cities, supported by FPL, had asked this Court to grant an extension of time for the filing of a Petition for Writ of *Certiorari.* The purpose of the application was to permit time for the FERC to review the settlement and, if the settlement were approved, thereby mooting the case, to permit the parties to file a motion to vacate with the Former Fifth Circuit. *See,* "Application for An Extension of Time to File a Petition for Writ of *Certiorari* to the United States Court of Appeals for the Eleventh (Former Fifth) Circuit," pp. 2-3. [App. M at pp. A-70 - A-71] On April 23, 1982, Justice Powell granted the extension "to and including June 21, 1982." [App. N, p. A-74]

[7]The Potomac Electric Power Company sought leave to intervene late in order to oppose the Motion to Vacate the Former Fifth Circuit decision. This request was denied on August 16, 1982. [App. R, p. A-85]

## REASONS FOR GRANTING REVIEW

The action of the Former Fifth Circuit in refusing to vacate its judgment in *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), as moot, is directly contrary to this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The granting of *certiorari* in the present case is essential to meet the concern of the *Munsingwear* court "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." 340 U.S. at 41.

The opinions of this Court leave no doubt that the settlement of a case will, via mootness, serve to bar the further appellate review of the merits of the case that might have otherwise been available. *Black v. Amen*, 355 U.S. 600 (1958); *Verret v. Oil Transport Co., Inc.*, 365 U.S. 768 (1961); *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959); *Hammond Clock Co. v. Schiff*, 293 U.S. 529, 530 (1934); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., Inc.*, 638 F.2d 7, 8 (2nd Cir. 1980).

The established practice in dealing with a civil case that has become moot after decision, but before the exhaustion of the appellate process, is to vacate the judgment below and remand with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. at 39; *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94(1979); *NOW, Inc. v. Idaho*, 51 U.S.L.W. 3251 (U.S. October 5, 1982).

The same practice has been held applicable to administrative orders where the possibility of appellate review, or review on rehearing, is barred by intervening mootness. *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961); *Stewart v. Southern Railway Co.*, 315 U.S. 283, *vacated as moot* 315 U.S. 784 (1942); *Tennessee Gas Pipeline Co. v. Federal Power*

*Commission*, 606 F.2d 1373, 1382 (D.C. Cir. 1979). As this Court states in *Munsingwear*, 340 U.S. at 39-40:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary. (footnote omitted)[8]

And, as this Court states in *Mechling, supra*, 368 U.S. at 329:

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[8]On motions of the parties, both the Nuclear Regulatory Commission and District Court have applied the *Munsingwear* doctrine. See p. 5, n. 4, *supra.*, "Memorandum and Order (Concerning Motions to Dismiss, Terminate and Vacate)," *Florida Power & Light Company* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A, Atomic Safety & Licensing Board, 15 NRC 639, 642 (1982) [App. L at p. A-67]:

> FPL and Cities have requested that our Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits, dated December 11, 1981 (LBP-81-58, 14 NRC 1167) should be vacated. They argue by analogy to established federal practice that when an appeal becomes moot it is appropriate to vacate the trial court's decision. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).
>
> We accept this argument as valid. Moreover, our decision of December 11, 1981, was tentative, being left open by us for further objection by the parties. Given the preliminary nature of that opinion and the agreement of the parties not

> We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders, and we adopt its procedure here. The District Court should have vacated the order which it declined to review. (footnote omitted)

Since the time to petition this Court for *certiorari* had not run as of the date of the filing in the Former Fifth Circuit of the Motion to Vacate as Moot, the *Munsingwear* doctrine is fully applicable. When FPL and the Florida Cities filed their joint motion to vacate, the Court had no choice other than to vacate its judgment.[9] The granting of *certiorari* and

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> to contest it, that opinion ought to be vacated. It is our duty to adjudicate disputes and not to stand in the way of settlements by refusing a reasonable request to vacate our order.

"Amended Order of Dismissal," *Lake Worth Utilities Authority, et al. v. Florida Power & Light Company*, S.D. Fla., Case No. 79-5101-Civ-JLK, March 23, 1982 [App. K at p. A-63]:

> FURTHER ORDERED AND ADJUDGED that the Court's October 9, 1981 Order Denying Motions for Summary Judgment on Plaintiff's Gas Claim And Granting Defendant's Summary Judgment Motion on Plaintiff's Nuclear Access Claim be, and hereby is, vacated as moot.

[9]Even if (contrary to *Munsingwear, supra)* the Court of Appeals had some area of discretion, no reason appears for the denial of the parties' motion, and there was none. In contrast to its action in this case, in *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 216 (5th Cir. 1975), the Fifth Circuit withdrew its own previous decision and vacated its previous judgment due to mootness, citing *Munsingwear. Lebus v. Seafarers' International Union*, 398 F.2d 281, 283 (5th Cir. 1968) also attests to the Fifth Circuit's adherence to *Munsingwear. See, Troy State University v. Dickey*, 402 F.2d 515, 516-517 (5th Cir. 1968); *St. Louis-San Francsico Railway Co. v. Railroad Yardmasters*, 347 F.2d 983, 984 (5th Cir. 1965). *Accord, Superior Oil Co. v. Hickel*, 421 F.2d 1089 (D.C. Cir. 1969); *Schwartz v. Olympic, Inc.*, 174 F.2d 830 (3rd Cir. 1949); *Cold Metal Process Co. v. Carnegie-Illinois Steel Corp.*, 115 F.2d 33 (3d Cir. 1940). The Court of Appeals' action here is unexplained and inexplicable.

reversal of the decision below will avoid binding parties by a case where review was prevented as a result of settlement, *Munsingwear, supra,* thus furthering the Commission's long-standing policy to support settlement of litigation. It would enforce compliance with this Court's decisions, *Vermont Yankee Nuclear Power Corporation v. NRDC,* 435 U.S. 519, 525 (1978).

As the Fifth Circuit itself has stated:

> . . . Commission approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of . . . evermore complicated problems . . . . Consequently settlements should be encouraged, not discouraged. (footnotes omitted)

*Texas Eastern Transmission Corp. v. FPC,* 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied sub nom. Manufacturer's Light & Heat Co. v. Texas Eastern Transmission Corp.,* 375 U.S. 941 (1963). *Accord, e.g., Mitchell Energy Corp. v. FPC,* 519 F.2d 36, 40 (5th Cir. 1975); *Amoco Production Company v. FPC,* 465 F.2d 1350, 1354-1355 (10th Cir. 1972); *City of Chicago v. FPC,* 385 F.2d 629, 640 (D.C. Cir. 1967), *cert. denied sub nom. Public Service Commission v. FPC,* 390 U.S. 945 (1968).

Here, part of the bargain the parties reached was to seek vacation of court and agency decisions still subject to review. Settlements can only be discouraged if parties know that by entering into them, they will become bound by all interlocutory decisions.

## CONCLUSION

For the foregoing reasons, the Writ of *Certiorari* should be granted, the judgment of the Court of Appeals in No. 80-5259 should be vacated, and the case should be remanded to the Court of Appeals with directions to dismiss the case as moot. Petitioners suggest that the relief requested may be granted summarily.

Respectfully submitted,

Robert A. Jablon
Attorney for Petitioners, the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission, the Sebring Utilities Commission, and the Cities of Gainesville, Homestead, Key West, Kissimmee, St. Cloud, Starke, and Tallahassee, Florida

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